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No. 80-133

In the Supreme Court of the United States

OCTOBER TERM, 1980

LEVITT & SONS OF PUERTO RICO, INC.,
PETITIONER,

v.

COMMERCIAL INSURANCE COMPANY,
RESPONDENT.

Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

REPLY BRIEF FOR PETITIONER

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RESPONSE TO BRIEF IN OPPOSITION

Commercial's essential claim in its brief is that Levitt "waived its right to a trial by agreeing to submit for adjudication the remaining controversy by briefs". This assertion is based on an order of the District Court of March 29, 1977, that was challenged on appeal by Commercial.

Such order issued by the Hon. District Judge James T. Watson stated that at the settlement conferences held in his chambers, the parties settled with the plaintiffs, and that Levitt and Commercial agreed to submit for adjudication their claims against each other by briefs. (Respondent's brief in opposition, Appendix B, Pg. 16).

This order has nothing to do with the issue before this court.

The case is brought for review here because, after a joint appeal filed by Commercial and Levitt, the former filed a counter-complaint on September 15, 1978 alleging that not only would the "dispute" between Levitt and Commercial continue, but that an agreement had been held in chambers before Hon. James T. Watson that "if Commercial was successful in its defense against the claim of Levitt, then Levitt would reimburse Commercial for the aforesaid sum of $34,000 plus interest that it paid". (Commercial's Counter-Complaint against Levitt & Sons of Puerto Rico, Appendix D of the petition for Certiorari, at pg. 23).

This allegation was formally denied by Levitt. (Appendix E of the Petition for Certiorari, page 25). The court, without holding any evidentiary hearing as to this controversy, entered judgment against Levitt for $34,000 because it found that as a matter of fact such an agreement had taken place. That the judgment against Levitt was entered because of this finding of fact is acknowledged in Respondent's brief in opposition at page 4.

Levitt never waived its right to bring evidence as to this critical point. There is nothing in the record to support Commercial's assertion that, after this new factual allegation was introduced in Commercial's counter-complaint, Levitt waived in any manner the right to controvert this factual pleading upon which this case rests.

The superintending power of this court is requested, not because there is an important question of federal law involved, but because the rights of the petitioner were decided without

an opportunity to controvert the opposing party allegations, and because the Court of Appeals, even though acknowledging such travesty, affirmed it.*

Respectfully submitted,

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* If Levitt is granted the right to a hearing it will bring to the attention of the court Commercial's representation to the First Circuit that it was not present at the meeting where the alleged settlement was reached, and where as subsequently Commercial alleged, a "winner-take-all" agreement was executed. (Consolidated Brief of Commercial and Levitt, Appendix A of this Reply Brief). "Appellant's major contention is that Commercial's attorney was not present at the second settlement conference held on February 18, 1977, when the alleged settlement was reached . . ." *Berrios Rivera* v. *British Ropes Ltd.*, 575 F.2d 966, 968 (C.A. 1, 1978).

APPENDIX A

United States Court of Appeals
For the First Circuit

No. 77-1257

JOSE BERRIOS RIVERA, ETC.,
PLAINTIFFS, APPELLEES,
v.
BRITISH ROPES LTD., ET ALS.,
DEFENDANTS, APPELLEES,
v.
HARNISCHFEGER CORPORATION,
DEFENDANT AND THIRD PARTY PLAINTIFF, APPELLEE,
v.
LEVITT & SONS OF PUERTO RICO, INC.,
THIRD PARTY DEFENDANT, APPELLANT,
v.
COMMERCIAL INSURANCE COMPANY
OF NEWARK, NEW JERSEY,
ADDITIONAL THIRD PARTY DEFENDANT, APPELLEE.

No. 77-1258

JOSE BERRIOS RIVERA, ETC.,
PLAINTIFFS, APPELLEES,
v.
BRITISH ROPES LTD., ET ALS.,
DEFENDANTS, APPELLEES,
v.
HARNISCHFEGER CORPORATION,
DEFENDANT AND THIRD PARTY PLAINTIFF, APPELLEE,
v.
COMMERCIAL INSURANCE COMPANY
OF NEWARK, NEW JERSEY,
ADDITIONAL THIRD PARTY DEFENDANT, APPELLANT.

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* * *

[4] *Statement of Facts Relevant to the Issue That a Settlement Had Been Effected.*

On February 1, 1977, the attorneys for all parties met in chambers with Honorable James L. Watson, a visiting judge sitting by designation, for a settlement conference. At that meeting all parties agreed to *recommend* to their respective clients settlement of plaintiff's claim in the sum of $136,000.00, to be paid in equal sums of $34,000.00 by each of the clients represented, to wit, British Ropes, Harnischfeger, Levitt, and Commercial (A.14). The parties further agreed to report to the Court, and *three* of the attorneys met with the Court below on February 18, 1977, to again discuss settlement. At the February 18, 1977 conference, attorney for Commercial was not present (A. 39 fn. 2).

On March 29, 1977, the Court below issued its order stating, "the parties agreed to settle this question for the total sum of $136,000.00 to be paid to plaintiff . . ."

On April 7, 1977, British Ropes requested reconsideration on the grounds that it had only agreed to make a $30,000.00 settlement (A. 16). On April 12, 1977, the Court granted reconsideration and stated:

> "Contribution of British Ropes, Ltd., to settlement shall be $30,000.00". (A. 16).

[5] On April 12, 1977, plaintiff opposed the reconsideration requested by British Ropes claiming that:

> "No formal notice was given to the undersigned (plaintiff's attorney) attorney at the conference held on February 18, 1977, by co-defendant, British Ropes, Ltd., that their contribution would be only $30,000.00 . . ." (A. 20).

On April 20, 1977, Commercial mailed the Court its motion to vacate the March 29, 1977 Order, (filed April 22, 1977, 8:30 A.M.), since all parties had agreed to *recommend* settlement in equal shares, and it opposed the "chipping" tactics of British Ropes. (A. 21, 22). This motion was denied by Honorable Judge Toledo on April 27, 1977. On April 26, 1977, Levitt also petitioned for a vacation of the March 29, 1977 Order, since it was evident that at the settlement conference on February 18, 1977, no settlement of the matter was reached. (A. 29, 30).

From the above is is clear that plaintiffs, British Ropes, Levitt, and Commercial had not reached an accord, or a meeting of the minds, and in one form or another had objected to the March 29, 1977, "settlement" Order issued by the Court.

In the interim, on April 22, 1977, at 4:05 P.M., Harnischfeger filed a "Motion Executing Settlement" with the Court below wherein Harnischfeger, with plaintiff's consent, requested that the March 29, 1977, and April 12, 1977 Orders remain in force *with the exception that Harnischfeger be allowed to increase its contribution from $34,000.00 to $38,000.00,* to cover the $4,000.00 difference, which British Ropes had refused to pay. (A. 23, 24). With remarkable speed, forty-five minutes later, the Court below, (Honorable Judge Toledo), entered its two page Order granting the motion of Harnischfeger, and [6] re-apportioned the sums to be paid by each of the defendants. The Order also erroneously states that:

> "On April, 1977, Commercial Insurance Company of Newark, New Jersey, filed a motion alleging that in view of the tactics of British Ropes, Ltd., it will only pay $30,000.00 of the settlement judgment." (A. 25)[1]

[1] This is obviously in error. Although the Court does not insert the date in April, 1977, that Commercial filed its motion, the Court is obviously referring to Commercial's "Motion to vacate the order of the Court". dated April 20, 1977, and filed on April 22, 1977, at

On April 28, 1977, Commercial and Levitt timely filed notices of appeal of the March 29, 1977 Orders, and subsequent Orders of this Court. The Orders of the Court resolving that a settlement had been effected, and subsequent entry of judgment therein, presents the second issue for review by this Honorable Court.

* * *

[14] II. THE COURT BELOW ERRED IN HOLDING THAT A SETTLEMENT HAD BEEN REACHED, WHERE THREE OF THE PARTIES DISAGREED AS TO THE ALLEGED SETTLEMENT, AND ONE OF THE PARTIES WAS NOT EVEN PRESENT AT THE SETTLEMENT CONFERENCE.

The series of events as set forth in the statement of the case makes it amply clear that there was never any meeting of the minds as to the crucial issue of whether or not a settlement had been reached. Clearly, there was never any settlement.

Indeed, the second settlement conference was not attended by Commercial and during the time between said second settlement conference (February 18, 1977) and the March 29, 1977 Order of the Court, the parties never met to draft releases, or draft any formal stipulation for judgment as is usual in these types of cases. No formal or [15] informal consent was given by Commercial as to the settlement and it objected to the settlement. British Ropes objected to the amount it was ordered to pay; the plaintiff objected to a reduction in the amount it was to receive, and Levitt left the conference believing that a settlement had not been reached. It is obvious that the reason there were no formal meetings between the parties to prepare the usual stipulations was because all parties felt there had not been a settlement. The only agreement ever

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8:30 A.M. In its motion, Commercial *never* indicated it was agreeable to paying any sums, but asked that the March 29, 1977 Order be vacated and allow the case to proceed to trial. (See A. 21). It appears the Court's error was caused by Harnischfeger's motion which contains the exact same error. (see A. 23).

reached was a preliminary understanding between the attorneys on February 1, 1977, to *recommend* to their clients a settlement of $136,000.00 to be divided in four (4) equal shares. Clearly, the second settlement conference did *not* reach agreement between the parties.

Rather, it appears that on or about April 22, 1977, plaintiff and Harnischfeger reached a private accord for settlement *on that date*, and thereafter, moved the Court to overrule the objections filed by the other parties. Certainly, the private accord between plaintiff and Harnischfeger could not bind Levitt and Commercial, appellants herein.

Under local law, 31 L.P.R.A. 3391, there is no contract if the consent of a party is not given, and consent requires an offer, and an acceptance of the offer, 31 L.P.R.A. 3401. The consent is null, if there has been an error that affects the substance of the contract, 31 L.P.R.A. 3404, 3405. A settlement or compromise is a *contract* where the parties *giving, promising,* or *retaining something,* avoid the commencement of a suit or otherwise terminate an active suit, 31 L.P.R.A. 4821. As a matter of fact, a settlement can be rescinded, if one of the parties is unaware of a final judgment at the time the parties accord a settlement, 31 L.P.R.A. 4830.

In the case at bar, the clear consent, promise and accord of several parties is missing.

[16] The Court below, (Honorable Judge Toledo) acknowledges that the sequence of events leading toward settlement gives the impression of "complexity and dubiousness"(A. 50). The Court also acknowledged that after the March 29, 1977 Order, British Ropes moved the Court "for a reduction in its contribution from $34,000.00 to $30,000.00, (which) Judge Watson granted . . . ." (A. 50). Notwithstanding the lack of consent, the Court held that

> "in order for the Order of March 29, 1977 (to) be null some irregularity must have taken place. . . ." and that, "in any event, we have to presume the validity of said settlement and of the Order issued on March 29, 1977 in the absence of any evidence to the contrary."

Thus, the Court below in one full sweep held that, since there was no fraud or other irregularity, a settlement was concluded even though,

(a) there was no consent by one or more of the parties, and

(b) the sequence of events gave the impression of "complexity and dubiousness", and

(c) several parties after the March 29, 1977 Order, objected to the settlement, and,

(d) the plaintiff and Harnischfeger held a private accord on or about April 22, 1977 to settle the problem caused by the Court's reduction of the amount to be paid by British Ropes.

Under such circumstances, it is clear error for the Court below to hold that a judgment has been effected.

[17] CONCLUSION

The Order of the Court below dated December 16, 1976, and entered on December 21, 1976, denying the motions of Commercial and Harnischfeger to dismiss on the basis of Res Judicata should be reversed with directions to enter jidgment dismissing the complaint, otherwise the alternative remedy should be granted, ordering the vacation of the March 29, 1977 Order, with instructions for the proceedings to continue.

Respectfully submitted,

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